UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTINA WALTMON,

Plaintiff,

v.

ECOLOGY AND ENVIRONMENT, INC.,

Defendant.
_____/

No. C-00-0587 JCS

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant Ecology and Environment Inc.'s Motion For Summary Judgment, or Alternatively, Summary Adjudication (hereinafter, "Motion") came on for hearing on Friday, December 15, 2000, at 9:30 a.m. For the reasons stated below, Defendants' Motion is DENIED.

II. BACKGROUND

A. Facts[1]

Plaintiff Christina Waltmon was hired by Defendant Ecology and Environment Inc. (hereinafter, "E & E") in August 1997 to work as a receptionist in Defendant's San Francisco office.

[1] In summarizing the facts, the Court has relied upon undisputed facts whenever possible. Where the facts are in dispute, the Court has drawn all inferences in favor of Plaintiff. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1373 (9th Cir. 1987) (holding that on summary judgment court must view the evidence and the inferences from that evidence in the light most favorable to the nonmoving party). On the other hand, the Court agrees with Defendant that a party cannot create an issue of fact by submitting an affidavit that contradicts the party's own prior testimony. *See* Defendant Ecology & Environment's Objections To Plaintiff's Evidence Submitted In Opposition To Defendant's Motion For Summary Judgment, Or, Alternatively, Summary Adjudication ("Defendant's Objections"), at 2. To the extent that Plaintiff's declaration in support of her Opposition to this motion directly contradicts her own prior testimony, the Court does not consider that declaration. The Court does not rule on Defendant's Objections based on inadmissible speculation, conclusory statements and hearsay because the Court did not rely on any of the specific evidence to which Defendant objected on these grounds. Similarly, the Court need not rule on Defendant's objections to evidence referenced in Plaintiff's separate statement of facts because the Court did not rely on any party's statements of facts but rather, only relied on evidence in the record.

Decl. of Christine Duncan in Support of Defendant Ecology and Environment's Motion for Summary Judgment or, in the Alternative, Summary Adjudication (hereinafter, "Duncan Decl.") at ¶ 1. On October 23, 1998, Plaintiff's supervisor, Christine Duncan, met with Plaintiff to discuss Plaintiff's absenteeism, which Duncan felt was becoming an increasing problem. Deposition of Christine Duncan (hereinafter, "Duncan Depo.") at 35, Exh E. to Declaration of Mary L. Guilfoyle in Support of Defendant Ecology and Environment's Motion for Summary Judgment or, in the Alternative, Summary Adjudication (hereinafter, "Guilfoyle Decl."). During that meeting, Plaintiff told her supervisor that some of her absences had been due to a back injury, "which caused her to have to attend many doctor appointments." Notes of Christine Duncan, attached as Exh. C to Duncan Depo., Exh. E to Guilfoyle Decl. Duncan told Plaintiff that from that point on she would be required to provide a note from her doctor when she called in sick. *Id.* She also stated that she had not yet contacted the company's headquarters in Buffalo, New York because she wanted to give Plaintiff "one last chance." *Id.* On November 20, Duncan issued a memorandum in which she stated that although Plaintiff's absenteeism had improved, it continued to be a problem and that if Plaintiff did not continue to improve, she could be "subject to further disciplinary measures up to and including termination." 11/20/98 Memorandum From Duncan to Waltmon, Exh. E to Duncan Depo., Exh. E to Guilfoyle Decl. A copy of the memorandum was sent to Janet Steinbrucker, the Human Resources Director of E & E, in Buffalo. *Id.*; see also Declaration of Colleen Antonio ("Antonio Decl.") at ¶ 1.

On February 24, 1999, Duncan again talked to Plaintiff about her "excessive absenteeism." Notes of Christine Duncan, attached as Exh. F to Duncan Depo., Exh. E to Guilfoyle Decl. Two days later, on Friday, February 26, 1999, Plaintiff called in sick, telling her employer that she was experiencing lethargy, nausea and back pain. Deposition of Christine Waltmon at 26-27 ("Waltmon Depo."), Exh. A to Guilfoyle Decl. According to Waltmon, she had hurt her back a few days earlier, when she was lifting a heavy box. *Id.* at 27. On the same day, Duncan, "initiated termination." Notes of Christine Duncan, attached as Exh. F to Duncan Depo., Exh. E to Guilfoyle Decl. In her notes, Duncan stated that "I felt that after our talk on Wednesday, calling in sick on

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Friday was an indication that she simply didn't care about keeping her job." *Id.* On Monday, March 1, 1999, Plaintiff again called in sick. Waltmon Depo. at 29, Exh. A to Guilfoyle Decl.

On March 2, 1999, Plaintiff called in sick again, this time stating that she believed that she was pregnant because she had taken a home pregnancy test which gave a positive result. Notes of Christine Duncan, attached as Exh. F to Duncan Depo., Exh. E to Guilfoyle Decl. On March 3, Ms. Duncan called the Buffalo office and spoke to Colleen Antonio and Janet Steinbrucker to notify them that Plaintiff might be pregnant. Antonio Decl. at ¶ 3. Antonio is a benefits administrator with E & E and also assists Ms. Steinbrucker with personnel matters. Upon learning that Plaintiff might be pregnant, her termination was voided. *Id.* In their March 3 conversation, Ms. Steinbrucker, Ms. Antonio and Ms. Duncan discussed the possibility that Plaintiff might be eligible for extended leave under the Family Medical Leave Act ("FMLA") or the California Family Rights Act ("CFRA"). *Id.* at ¶ 4. Ms. Antonio faxed the required paperwork for obtaining such leave, including a medical certification form, to Ms. Duncan, as well as the company's standard cover letter. *Id.* The paperwork was sent to Plaintiff by courier on the same day. Waltmon Depo. at 40, Exh. A to Guilfoyle Decl. The paperwork was accompanied by a letter signed by Ms. Duncan that stated, in part, as follows:

> If your absences are due to a serious health condition, you may qualify for leave under the Family and Medical Leave Act. We need to verify the reason (s) for your recent absences as well as establish when you will be able to return to work. If your doctor determines that the attached form is not appropriate in your case, please ask him (or her) to forward a statement concerning your absence from work if the reason is due to illness. It is not necessary for your doctor to provide us with a diagnosis but rather to verify that you absences are due to illness in general.

March 3, 1999 Letter from Duncan to Waltmon, Exh. G to Duncan Depo., Exh. E to Guilfoyle Decl. The letter concluded by asking Plaintiff to return the documentation no later than March 12, 1999. *Id.*

On the evening of March 3, Plaintiff called Ms. Duncan at home and left a voice mail message stating that her doctor would not be in until Friday, March 5 and that he had told her he would provide a note or fill out a form at that time. Notes of Christine Duncan, Exh. F to Duncan Depo., Exh. E to Guilfoyle Decl. Plaintiff called in sick on March 4 and March 5. *Id.* On March 8, 1999, Plaintiff called in sick and spoke to Ms. Duncan about the documentation requested in Ms.

Duncan's March 3 letter. Notes of Christina Duncan, Exh. F to Duncan Depo., Exh. E to Guilfoyle Decl. According to Ms. Duncan, Plaintiff explained that she had obtained a doctor's note from Dr. Draisin, which stated as follows:

> This letter is written on behalf of my patient Christina Waltmon. Ms. Waltmon has recently missed work from February 26 to present. During this time she has been troubled by incapacitating headaches, nausea, vomiting and profound lethargy. The evaluation for these symptoms is just getting underway but I believe will prove to be secondary to stress caused by an ongoing serious health problem her mother is going through. In my opinion, Ms. Waltmon's reaction is entirely normal and she would greatly benefit by a stress management program. I certainly feel that she qualifies for a temporary stress related disability leave of absence.

March 8, 1999 Letter by Jeffrey Draisin, Exh. H to Duncan Depo., Exh. E to Guilfoyle Decl. Plaintiff read the letter to Ms. Duncan over the telephone, and Ms. Duncan asked why it did not refer to Plaintiff's pregnancy. Notes of Christina Duncan, Exh. F to Duncan Depo. Exh. E to Guilfoyle Decl. Plaintiff stated that the doctor had not obtained the pregnancy test results yet. *Id.*

On March 9, Ms. Duncan had a courier sent to Plaintiff's home to pick up the note from Dr. Draisin, which she faxed to Buffalo. Duncan Depo. at 87- 88. On the same day, Ms. Antonio called Ms. Duncan to inform her that the March 8 note from Plaintiff's doctor was insufficient because it was not on letterhead and it did not contain enough information about Plaintiff's medical condition. Antonio Decl. at ¶ 5. Ms. Duncan, in turn, called Plaintiff to tell her that she needed to provide a letter that was on letterhead and contained more information. Duncan Decl. at ¶ 18. In response, Plaintiff obtained a second letter from her doctor, dated March 10, 1999, which she provided to her employer. *Id.* at ¶ 19; see also March 10, 1999 Letter by Dr. Draisin, Exh. J to Duncan Depo., Exh. E to Guilfoyle Decl.

On March 19, 1999, Ms. Duncan wrote a memorandum to Janet Steinbrucker and Colleen Antonio requesting that they "consider letting [her] terminate [Plaintiff], based on [Plaintiff's] previous poor attendance . . . and the fact that she lied" concerning her pregnancy. Exh. D to Declaration of R. Michael Hoffman in Opposition to Defendant's Motion For Summary Judgment or, Alternatively, Summary Adjudication ("Hoffman Decl.").[2] The record does not reflect whether

[2] There is no evidence in the record concerning the exact date on which Ms. Duncan learned that Plaintiff was not pregnant.

Ms. Steinbrucker responded to this memorandum. However, in Ms. Antonio's declaration, she states that "[h]ad I known that on March 2 and 3 Plaintiff was lying about her absences being related to her pregnancy, I would have initiated Plaintiff's termination for abusing the company's sick leave and medical leave policies at that time." Antonio Decl. at ¶ 16.

At some point prior to March 24, Plaintiff contacted E & E's Buffalo office to request replacement paperwork, stating that her daughter had ripped up the first set. Waltmon Depo. at 98, Exh. A to Guilfoyle Decl.; see also Antonio Decl. at ¶ 7. On March 24, Ms. Antonio sent Plaintiff a new set of paperwork, along with a letter stating, in part, as follows:

> Enclosed you will find information regarding Family and Medical Leave and the State Family Rights Act of 1991. Please be certain to read, sign and return all appropriate forms.
>
> The doctor's certificates we received are dated 3/8/99 and 3/10/99; both indicate you should receive "temporary disability." It is imperative that we receive additional information from your physician indicating the length of your current disability and a date when you will be released to work. Please return your physician note and the enclosed paperwork by April 1, 1999.

March 24 Letter from Antonio to Waltmon, Exh. L to Duncan Depo., Exh. E to Guilfoyle Decl. Although the package was sent by overnight mail via Federal Express, Plaintiff did not receive it until April 1 because the package was improperly addressed. Waltmon Depo. at 107, Exh. A to Guilfoyle Decl. As a result, Plaintiff was required to go to the Federal Express office to retrieve the package. *Id.* Plaintiff called Ms. Antonio on April 1 to explain that she had just received the package and therefore would not be able to meet the April 1 deadline. *Id.* Ms. Antonio extended the deadline to April 9. Antonio Decl. at ¶ 9.

On April 7, Plaintiff left a message with Ms. Antonio informing her that her doctor was out of town and that he would be returning the following week. April 15, 1999 Letter From Colleen Antonio to Christine Duncan, Exh. 7 to Waltmon Depo., Exh. A to Guilfoyle Decl. On April 8, Plaintiff called Ms. Duncan to inform her that her doctor was out of town and that she would be unable to have the forms completed until after he returned. April 8, 1999 Memorandum from Christine Duncan to Janet Steinbrucker and Colleen Antonio, Exh. F to Antonio Depo., Exh. D to Guilfoyle Decl. Ms. Duncan informed Ms. Antonio of Plaintiff's call in a memorandum dated

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April 8 in which she also stated that she had verified with the clinic that Dr. Draisin was out of town and would be returning on April 12. *Id.*

On April 14, 1999, Plaintiff saw her doctor and obtained a note from him, which she sent to her employer. Waltmon Depo. at 118, Exh. A to Guilfoyle Decl. The note stated, in part, as follows:

> This letter is to identify the current status of my patient, Christine Waltmon. I first notified you that Ms. Waltmon's disability began on February 28th. In my opinion at this time she is still approximately 3 months from adequate physical rehabilitation and stress management training to be able to successfully return to work. I will continue to update you as information about her progress is available.

April 14, 1999 Letter from Dr. Draisin, Exh. 1 to Waltmon Depo. There is no evidence in the record reflecting that Defendant received this letter. Plaintiff testified further in her deposition that her doctor also gave her the completed medical certification form on April 14, which she mailed to Colleen Antonio, in the Buffalo office. Waltmon Depo. at 114, Exh. A to Guilfoyle Decl. In contrast, Plaintiff states in her declaration that her doctor told her on April 14th that *he* had already mailed the medical certification form to E & E himself. Waltmon Decl. at ¶ 17.

Dr. Draisin testified in his deposition that he recalled filling out a form that he believed was provided by Plaintiff's employer, although he could not recall the specific form. Draisin Depo. at 126, Exh. C to Guilfoyle Decl. There is no evidence in the record indicating that any form other than the FMLA medical certification form was given to Dr. Draisin by Plaintiff. When asked what he had written in the form, Dr. Draisin stated that he could only recall a diagnosis and identification of treatment. *Id.* at 112. He was then asked, "What was your diagnosis of Ms. Waltmon at the time that you filled out the form?" *Id.* He replied, "She had two diagnoses; she had a diagnosis of a situationally induced depression with anxiety components and an exacerbation of the myofascial pain syndrome." *Id.*[3] Dr. Draisin also testified, after reviewing the FMLA medical certification form

[3] Dr. Draisin did not define "myofascial pain syndrome" in his deposition. However, other documents in the record indicate that this is a back condition. In a letter dated September 13, 1999, Dr. Draisin stated that Plaintiff was suffering from "a myofascial pain syndrome of the upper back and neck." September 23, 1999 Letter by Dr. Draisin, Exh. 23 to Waltmon Depo., Exh. B to Guilfoyle Decl. In that letter, Dr. Draisin stated that the diagnostic code for that condition was 729.9. Id. In addition, in a letter dated August 5, 1999, Dr. Draisin described Plaintiff as suffering "a long-standing mechanical back pain syndrome – cerivcle (sic) somatic dysfunction (ICD9 Code 729.9)." August 5, 1999 Letter by Dr. Draisin, Exh. 23 to Waltmon Depo., Exh. A to Guilfoyle Decl. Finally, in a letter dated April 14, 1999, Dr. Draisin stated that the "diagnostic code for Christine Waltmon's back condition is 729.9." April 14, 1999 Letter from Dr. Draisin, Exh. 23 to Waltmon Decl., Exh. A to Guilfoyle Decl.

in his deposition, that Plaintiff qualified as having a "serious health condition" at the time he filled out the form, as that term was defined in the form. Draisin Depo. at 204, Exh. A to Hoffman Decl.; see also Medical Certification Form, Exh. D to Hoffman Decl. at Bates No. D078, D097 - D100. Finally, Dr. Draisin testified that he recalled mailing the form in an envelope that was attached to the form. Draisin Depo. at 122, Exh. C to Guilfoyle Decl. He had no memory, however, of the address on the envelope. *Id.*

On April 15, Ms. Antonio sent Plaintiff another letter. April 15, 1999 Letter from Colleen Antonio to Christine Waltmon, Exh. 7 to Waltmon Depo., Exh. A to Guilfoyle Decl. In this letter, Ms. Antonio summarized E & E's efforts to obtain the FMLA paperwork from Plaintiff, beginning with Ms. Antonio's letter of March 24. *Id.* Ms. Antonio concluded by informing Plaintiff that if the forms were not received by April 20, E & E would construe her failure to respond as a voluntary resignation. *Id.* Between April 16 and April 20, Plaintiff called E & E every day to inquire as to whether the paperwork had arrived. Waltmon Depo. at 124, Exh. A to Guilfoyle Decl. Each time, she was told that E & E had not received the forms. *Id.* On April 21, E & E terminated Plaintiff. Antonio Decl. at ¶ 12; see also April 21, 1999 Letter from Colleen Antonio to Christine Waltmon, Exh. J to Antonio Decl.[4] On April 27, Dr. Draisin called E & E on behalf of Plaintiff, but Ms. Antonio did not return his call because Plaintiff had already been terminated. Antonio Depo. at 127-128, Exh. C to Hoffman Decl.

B. Claims

In her complaint, Plaintiff brings the following claims against E & E:

[4] According to Ms. Antonio, Plaintiff called E & E three times on April 21 and left messages with Ms. Antonio's assistant stating that her doctor had lost the FMLA paperwork and requesting another set of forms. Antonio Decl. at ¶ 13; see also Telephone Message Notes, attached as Exh. V to Duncan Depo., Exh. E to Guilfoyle Decl. Plaintiff denies that she called to request additional forms on the 21st. Waltmon Depo. at 114, Exh. A to Guilfoyle Decl.

Claim 1: Violation of the California Family Rights Act ("CFRA"), Cal. Gov. Code § 12945.2;[5]

Claim 2: Termination in Violation of Public Policy; and

Claim 3: Intentional Infliction of Emotional Distress.

In her complaint, Plaintiff alleged that she took a leave of absence for two reasons: 1) "to care for her mother who was sick and hospitalized for a period of time;" and 2) due to plaintiff's own back injury, a condition for which she was receiving continuing treatment." Complaint at 2. However, Plaintiff has stipulated that she will not seek damages with respect to her allegation that she was entitled to leave on the basis that she needed to care for her mother. See Stipulation And Proposed Order Thereon RE: Plaintiff Christina Waltmon's Dismissal Of Her Claim For Damages For Her Need For Medical Leave To Care For Her Mother, filed November 8, 2000.

C. Defendant's Motion

Defendant asserts in its Motion that it is entitled to summary judgment on the following grounds:

1. CFRA claim:

   a. Plaintiff has presented no admissible evidence showing that she submitted the required certification of her medical condition, despite being given almost two months by her employer to do so. Motion at 12-15. In support of this position, Defendant argues that the deposition testimony of Dr. Draisin that he sent the form is inadmissible because it was not based on any personal knowledge of what form was mailed, when it was mailed, or where it was mailed to. *Id.*

[5] Although Plaintiff alleges a single claim under the CFRA, the Court construes Plaintiff's claim as two separate claims, as will be discussed further below: first, a claim that Plaintiff's employer unlawfully interfered with her right to take CFRA leave, in violation of Cal. Gov't Code § 12945.2(a); second, a claim that Plaintiff's employer discriminated and retaliated against her for asserting her rights under the CFRA by terminating her, in violation of Cal. Gov't Code § 12945.2(l).

b. There is no evidence showing that Plaintiff suffered from a serious health condition as defined under the CFRA. Motion at 16 - 17.

2. Violation of Public Policy Claim: Plaintiff's public policy claim must fail because the alleged violation of public policy is Defendant's violation of the CFRA. Therefore, for the same reasons Plaintiff's CFRA claim must fail, so must her public policy claim. Motion at 18.

3. Intentional Infliction of Emotional Distress Claim ("IIED"): Plaintiff's IIED claim is barred by the exclusive remedy provisions of the California Workers' Compensation Act because Plaintiff's termination was a normal incident of employment. Nor has Plaintiff alleged or presented evidence of any conduct that is extreme or outrageous.

4. After-Acquired Evidence Argument: All of Plaintiff's claims are barred – or at least, Plaintiff may not recover lost wages and benefits – because Plaintiff's misrepresentation concerning her pregnancy constituted such severe misconduct that Plaintiff would have been terminated, as a matter of "settled company policy" if her employer had known of the misrepresentation at the time that it terminated her. Motion at 20-21.

In her Opposition, Plaintiff makes the following counter-arguments:

1. CFRA Claim:

a. Equitable tolling: The deadline for submitting the certification was equitably tolled because Plaintiff could not reasonably have been expected to act within the deadline set by her employer under the circumstances, notwithstanding her diligent, good faith effort to do so. Opposition at 9-10.

b. Equitable estoppel: Defendant is estopped by its own conduct from arguing that Plaintiff's termination was justified because she failed to submit the certification in the required time. In support of this argument, Defendant asserts that Defendant repeatedly changed the rules on Plaintiff as she attempted to meet the requirements for obtaining CFRA leave. Opposition at 11-12.

c. Serious health condition: There is evidence in the record, including the notes written by Dr. Draisin, that Plaintiff suffered from a serious health condition. The fact that these notes did not identify the specific health condition is irrelevant, as the CFRA prohibits the employer from requiring the employee to identify the serious health condition. Opposition at 11-12.

d. Evidence of discriminatory intent: Plaintiff has presented specific facts showing that Defendant's proffered reason for discharging Plaintiff – that she failed to provide the required medical certification – was a pretext and that Defendant terminated Plaintiff in retaliation for Plaintiff's effort to exercise her right to take CFRA leave. Opposition at 12-13.

2. Violation of Public Policy Claim: An employee can bring a public policy claim based upon a violation of the CFRA. Thus, to the extent that Plaintiff has established triable issues of material fact with respect to the CFRA claim, her public policy claim must also survive summary judgment. Opposition at 13.

3. IIED Claim: IIED claims that are based upon discrimination or violation of public policy are not preempted by the Workers' Compensation Act. Therefore, to the extent Plaintiff has established triable issues of material fact with respect to the CFRA claim, her IIED claim must also survive summary judgment. Moreover, discriminatory conduct is sufficient to show extreme and outrageous conduct. Opposition at 13-14.

4. After-Acquired Evidence Doctrine: Defendant has presented no evidence that it would have terminated Plaintiff as a matter of settled company policy. Moreover, Defendant knew that Plaintiff was not pregnant before it terminated her but chose not to terminate her on that basis. Opposition at 14-15.

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III. ANALYSIS

A. Standard on Summary Judgment

Rule 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the nonmoving party's claim, or to a defense on which the non-moving party will bear the burden persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also Nissan Fire & Marine Ins. Co. v. Fritz Companies Inc.*, 210 F.3d 1099 (9th Cir. 2000). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to designate "specific facts showing there is a genuine issue for trial." *Celotex*, 477 U.S. at 323. In opposing a summary judgment motion, the nonmoving party need not produce evidence in a form that would be admissible at trial. *Id*. at 324, (1986). A summary judgment motion may be opposed by any of the evidentiary materials listed in Rule 56(c) of the Federal Rules of Civil Procedure, although the mere pleadings themselves are not sufficient. *Id.*[6] On summary judgment, all reasonable inferences must be drawn in favor of the non-moving party. *Id*.

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[6] Rule 56(c) provides as follows:

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

B. CFRA Claim

1. Requirements of the CFRA

Under the CFRA, covered employees are eligible for up to 12 weeks unpaid leave for their own "serious health condition." Cal. Gov. Code § 12945.2.[7] In order to qualify for such leave, an employee must provide her employer with "at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave." Cal. Admin. Code, tit. 2, § 7297.4. The employee need not mention the CFRA or the FMLA, but she must "state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment." *Id.* Once the employer has been given notice of the need for CFRA leave, it may request "certification of the serious health condition." *Id.* Under the CFRA, certification shall be sufficient if it includes: 1) the date on which the serious health condition commenced; 2) the probable duration of the condition; and 3) a statement that due to the serious health condition the employee is unable to perform the function of his or her position. Cal. Gov. Code § 12945.2(k)(1). The certification need not, but may, at the employee's option, identify the serious health condition involved. Cal. Admin. Code, tit. 2, § 7297.0. The California regulations define "serious health condition" as "an illness, injury . . ., impairment, or a physical or mental condition of the employee . . .which involves either: 1) inpatient care . . or 2) continuing treatment or continuing supervision by a health care provider, as detailed in FMLA and its implementing regulations." Further, under the FMLA regulations, "continuing treatment by a health care provider" includes:

> (i) A period of incapacity . . . of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

29 C.F.R. § 825.114.

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[7] The statutory scheme for CFRA claims mirrors the scheme for claims under the FMLA. *See Marchisheck v. San Mateo County*, 199 F.3d 1068, 1073 (9th Cir. 1999). Moreover, the CFRA incorporates by reference the regulations interpreting the FMLA. Cal. Admin. Code, tit. 2, § 7297.10. Therefore, this Court draws on case law interpreting both the CFRA and the FMLA in its analysis.

Where an employer requests certification, "[t]he employer may require that the employee provide . . . certification within fifteen calendar days of the employer's request for such certification, unless it is not practicable for the employee to do so despite the employee's good faith efforts." Cal. Admin. Code, tit. 2, § 7297.4(b)(3). *See also* 29 C.F.R. § 825.305(b) (providing that "the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least fifteen calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts"). Further, the employer "shall advise an employee whenever an employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency." 29 C.F.R. § 825.305(d). If an employee never provides certification, the leave is not considered FMLA/CFRA leave. 29 C.F.R. § 825.311.[8]

2. Interference and Discrimination Claims under the CFRA

An employee may bring two types of claims under the CFRA: 1) a claim that her employer interfered with her right to obtain leave under the CFRA, in violation of Cal. Gov't. Code § 12945.2(a) (hereinafter, referred to as an "interference" claim); and 2) a claim that her employer discriminated or retaliated against her because she exercised her right to leave under the CFRA, in violation of Cal. Gov't Code § 12945.2(l) (hereinafter, referred to as a "discrimination" claim). *See Kaylor v. Fannin Regional Hospital, Inc., 946 F. Supp.*, 988, 995 (N.D. Ga. 1996) (explaining that FMLA is a "hybrid act," containing certain rights for the employee which "shall be unlawful" for the employer to violate and also providing protection in the event that an employer discriminates against an employee for exercising those rights). Plaintiff in this action brings both an interference claim and a discrimination claim. *See* Complaint at 3-4.

[8] Alternatively, where an employee provides certification and the employer questions the validity of the certification, the employer may request that the employee obtain a second opinion from another health care provider designated by the employer. Cal. Admin. Code, tit. 2, § 7297.4(b)(2)(A). Where the opinions of the first and second health care provider differ, the employer may request the opinion of a third health care provider. Cal. Admin. Code, tit. 2, § 7297.4(b)(2)(A) The employer may not, however, require the employee to provide any additional information about her medical condition other than what is required by the regulation. Cal. Admin. Code, tit. 2, § 7297.4(b)(2)(A)(1).

In *Kaylor*, the court concluded, based upon the legislative history of the FMLA, that interference claims under the FMLA are governed by a strict liability standard, while discrimination claims -- which require that the plaintiff establish discriminatory intent -- are to be analyzed under the shifting burdens of proof standard first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id*. at 996, 999. Although neither the Ninth Circuit nor the California courts have explicitly addressed whether the same framework should be applied to CFRA claims, at least one district court within the Ninth Circuit has implicitly held that it should. *See Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192, 1202, 1217 (S.D. Cal. 1998) (drawing on reasoning of *Kaylor* in support of its conclusion that a claim for interference under the FMLA is governed by a strict liability standard and noting at the outset of the opinion that because the FMLA and CFRA are so similar, that any analysis under the FMLA should be understood to apply to the CFRA as well). Based on the reasoning in *Kaylor* and the language of the CFRA, which mirrors that of the FMLA, this Court concludes that Plaintiff's interference claim under the CFRA is governed by a strict liability standard, whereas her discrimination claim requires a showing of discriminatory intent.

2. Timely Compliance With Request for Certification Form

Defendant asserts that it is entitled to summary judgment because Plaintiff "failed to provide sufficient information indicating a need for CFRA leave." Motion at 12. This argument is relevant to both of Plaintiff's interference claim and her discrimination claim under the CFRA. In particular, if, as Defendant asserts, Plaintiff failed to comply with her obligations under the CFRA to provide the required certification in the time allowed under the law, then Plaintiff did not have a right to leave under the CFRA and Defendant therefore did not "interfere" with Plaintiff's right. *See* 29 C.F.R. § 825.311. Similarly, Plaintiff's discrimination claim must fail if Defendant establishes that Plaintiff was terminated for a legitimate, non-discriminatory reason, namely, her failure to comply with the requirements of the CFRA. Thus, on summary judgment, once Defendant has produced evidence demonstrating that it neither interfered with Plaintiff's rights under the CFRA nor discriminated against her for exercising those rights, but rather, that it terminated Plaintiff because she failed to comply with the CFRA, Plaintiff must present specific facts showing that there is a

genuine issue of material fact with respect to whether she complied with the CFRA. Here, Defendant has presented evidence demonstrating that it terminated Plaintiff because she failed to comply with the CFRA. Therefore, Plaintiff must present specific facts demonstrating that there is a genuine issue of material fact on this issue.

Plaintiff asserts two arguments in response to Defendant's assertion that she failed to provide the required proper certification in a timely manner. First, Plaintiff asserts that the deadline for submitting her doctor's certification was equitably tolled because it was not practicable for Plaintiff to return the certification form within the time allotted, notwithstanding her diligent, good faith efforts to do so. Second, she asserts that Defendant should be equitably estopped from enforcing the statutory deadline on the basis of its own conduct. The Court finds that Plaintiff has demonstrated that a genuine issue of material fact exists under the equitable tolling doctrine. However, Plaintiff has failed to establish a genuine issue of material fact on the basis of the equitable estoppel doctrine.

Plaintiff asserts that, under the circumstances, she could not reasonably have been expected to provide the certification within the time allowed by her employer despite her diligent, good faith efforts to do so, and therefore, that the April 20 deadline set by her employer was equitably tolled. The regulations governing the CFRA and FMLA provide that the deadline for returning a certification may be equitably tolled where, under the circumstances, it is not practicable for the employee to provide the certification within the required time, despite the employee's good faith efforts. Cal. Admin. Code, tit. 2, § 7297.4(b)(3). *See also* 29 C.F.R. § 825.305(b) (providing that "the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least fifteen calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts"). Under the doctrine, a Plaintiff need not demonstrate any misleading conduct on the part of the employer. *Rager v. Dade Behring*, 210 F.3d 776,779 (7th Cir. 2000). Rather, she need only show that "under the circumstances the plaintiff could not reasonably have been expected to act within the deadline." *Id*.

In *Rager*, the court of appeals affirmed the district court's grant of summary judgment in favor of the employer. There, the Plaintiff requested leave under the FMLA on December 15

because she planned to undergo surgery the following week. *Id*. at 778. She dropped off a form requesting FMLA leave on December 20 but did not provide the medical certification form. *Id*. Her employer sent her a certified letter on December 23 stating that she must provide the certification form by January 12, and sent her a copy of the certification form on December 29. *Id.* On December 31, her employer sent her another letter stating that she must return the certification form by January 12 or she would be terminated. *Id*. Plaintiff failed to return the form by January 12 and provided no reason for failing to return the form. *Id.* The court found that the Plaintiff could not invoke the doctrine of equitable tolling on these facts because she provided no explanation for failing to return the form by the deadline and therefore, that she had not demonstrated that it would not have been practicable under the circumstances to return the form despite diligent, good faith efforts.

Here, in contrast, Plaintiff has presented evidence sufficient to create a genuine issue of material fact on the issue of equitable tolling. In particular, she has presented evidence from which a reasonable jury could conclude that although Plaintiff diligently sought to comply with her employer's requests, it was not practicable for her to do so under the circumstances: she has presented her doctor's testimony that he remembered mailing a form that had been provided to him by Plaintiff, which he believed to have been from her employer, in an addressed envelope that was attached to the form. Draisin Depo. at 122, Exh. C to Guilfoyl Decl. Although Dr. Draisin did not remember the specific form he had filled out, when he was shown an FMLA certification at his deposition, he testified that its was "about what [he] remember[ed] filling out." *Id*. at 124. Plaintiff has also presented evidence that between April 16 and April 20th she called E & E in Buffalo to inquire whether the form had been received. Waltmon Depo. at 124, Exh. A to Guilfoyle Decl. Based upon this evidence, a jury could reasonably believe that Plaintiff had diligently sought to comply with the deadline set by E & E and that it was not practicable for Plaintiff to meet the April 20th deadline set by her employer, despite her diligent effort to do so.

Defendant's reliance on *Satterfield v. Wal-Mart Stores*, 135 F.3d 973, 981 (5th Cir. 1998) and *Gibbs v. American Airlines, Inc.*, 74 Cal. App. 4th 1 (1999) in support of its position that Plaintiff failed to comply with the CFRA is misplaced. Both cases involved the question of whether the plaintiff had provided his or her employer with sufficient notice of their need for FMLA or

CFRA leave rather than the timeliness of providing certification. The facts of those cases are also distinguishable. In *Gibbs*, the court affirmed the jury's finding that the employer defendant had not violated the CFRA because the plaintiff had not provided sufficient notice to her employer of her need for leave. 74 Cal. App. 4th at 4. There, the plaintiff resigned three days after being put on a "90-day doctor note requirement," requiring that she provide a doctors note for all sick days. *Id*. at 5. Although Plaintiff had been out with the flu for the preceding week, she had told her supervisor when she returned to work that she would put her absences behind her, that she expected to be able to work her scheduled shift in the future, and even offered to increase her hours. *Id.* She did not request medical leave, say that she was ill, present a doctor's note, or appear ill. *Id.* On these facts, the court upheld the jury's determination that Plaintiff had not provided sufficient notice of her need for leave under the FMLA to shift the burden to the employer to seek further information. *Id*.

In *Satterfield*, the Fifth Circuit reversed the district court's judgment in favor of the employee plaintiff where the plaintiff alleged that her employer had violated the FMLA, holding that the defendant was entitled to judgment as a matter of law because the plaintiff had given insufficient notice of her need for FMLA leave. 135 F.3d 973, 974. There, the plaintiff had failed to come to work on June 16 and was terminated on June 19 for unexcused absences. *Id*. at 978-980. The plaintiff testified that on June 16 she had given her mother (who worked at the same store) a note to give to her supervisor stating that she was unable to come in that day because she had a pain in her side and asking whether she could make up the hours on her day off. *Id*. The plaintiff's mother testified that she gave the note to the supervisor. *Id*. The plaintiff also testified that her mother told plaintiff's supervisor that plaintiff was sick every day after June 16 that plaintiff was scheduled to work. *Id*. However, the plaintiff's testimony was contradicted by her mother's testimony that plaintiff's supervisor told her on the 16th that he planned fire plaintiff because the absence on the 16th constituted plaintiff's fourth unexcused absence in three weeks. *Id*. at 980. The court held that no reasonable jury could find that plaintiff had reasonably apprized her employer of her need to take time off for a serious health condition.

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The facts here differ significantly from those in *Gibbs* and *Satterfield*. In contrast to those cases, there is extensive evidence in the record that Plaintiff called her employer repeatedly and discussed her need for medical leave with her supervisor and the personnel office, that she provided two doctor's notes indicating that she had a medical condition, and that she requested a second set of CFRA forms to replace the first. Moreover, her employer clearly was on notice that Plaintiff was seeking leave under the CFRA and the FMLA, as evidenced by the fact that it repeatedly requested that Plaintiff provide it with the appropriate documentation and sent her the CFRA and FMLA paperwork. Under these facts, the Court declines to hold as a matter of law that Plaintiff's CFRA must fail because she failed to provide adequate information to her employer about her medical condition.

On the other hand, Plaintiff's assertion that the doctrine of equitable estoppel applies here is not supported by the record. Under the doctrine of equitable estoppel, where a plaintiff has failed to act within a limitations period, that limitations period may be tolled by improper conduct of the employer upon which the plaintiff actually and reasonably relied. *See Rager v. Dade Behring*, 210 F.3d 776, 779 (7th Cir. 2000). In *Rager*, the Seventh Circuit noted that the doctrine of equitable estoppel "no doubt" applies with respect to an employee's submission of certification under the FMLA. *Id*. However, it found that the doctrine did not apply under the facts of that case. Here, as well, the record does not support the Plaintiff's argument that Defendant is estopped by its own improper behavior from asserting a defense based upon Plaintiff's alleged failure to return the requested certification.[9] Although Defendant may have sent mixed messages with respect to what exactly was required of Plaintiff, *see, e.g.*, March 3, 1998 letter from Duncan to Waltmon (suggesting that Plaintiff could send either the forms or a letter from her doctor), Exh. 3 to Waltmon Depo., Exh. A to Guilfoyle Decl., Plaintiff conceded in her deposition that she understood that she needed to return the certification form by April 20 or she would be terminated. Waltmon Depo. at 42, Exh. A to Guilfoyle Decl. Conversely, there is no evidence in the record indicating that Plaintiff failed to return the certification form because she detrimentally relied upon any conduct or

[9] The Court assumes without deciding that the doctrine of equitable estoppel applies to the limitations period for submitting a requested certification to an employer under the CFRA.

representations by Defendant. Under these circumstances, Plaintiff has not demonstrated the existence of a genuine issue of material fact based upon a theory of equitable estoppel.

3. Serious Health Condition

Defendant asserts as an alternative ground for summary judgment that Plaintiff has not demonstrated a genuine issue of material fact with respect to the question of whether she suffered from a serious health condition at the time of her termination, as defined under the CFRA. Defendant points to the fact that it never received the certification it requested from Plaintiff and that the doctors' notes made no mention of a back injury – the serious health condition alleged in Plaintiff's complaint. The Court disagrees.

Plaintiff has presented specific facts demonstrating a genuine issue of material fact with respect to whether she suffered from a serious health condition. Specifically, she has presented deposition testimony by her doctor that in the spring of 1998, Plaintiff "had two diagnoses; she had a diagnosis of a situationally induced depression with anxiety components and an exacerbation of the myofascial pain syndrome." Draisin Depo. at 112, Exh. C to Guilfoyle Decl. As discussed above, although Dr. Draisin did not define "myofascial pain syndrome" in his deposition, evidence in the record indicates that this was a back condition. Dr. Draisin also testified that Plaintiff qualified as having a "serious health condition" at the time he filled out the form, as that term was defined in the FMLA form. Draisin Depo. at 204, Exh. A to Hoffman Decl.; see also Medical Certification Form, Exh. D to Hoffman Decl. at Bates No. D078, D097 - D100. This evidence is sufficient to establish a genuine issue of material fact on the question of whether Plaintiff suffered from a serious health condition, as defined under the CFRA.

C. Public Policy Claim

Defendant asserts that Plaintiff's public policy claim must fail because Plaintiff cannot establish that Defendant's conduct violated any public policy. The Court disagrees. Plaintiff has asserted a public policy claim based upon Defendant's alleged violation of the CFRA. To the extent that Plaintiff has established that a material issue of fact exists with respect her CFRA claim, her

public policy claim must also survive summary judgment. *See Nelson v. United Technologies, Inc.*, 74 Cal. App. 4th 597, 609 (1999) (holding that plaintiff can state a valid public policy claim under California law on the basis of an alleged violation of the CFRA).

D. IIED Claim

Defendant asserts that Plaintiff's IIED claim is preempted by the Worker's Compensation Act because Plaintiff's termination was a normal incident of employment. While tort claims based upon an employer's termination of the plaintiff are generally precluded by the exclusive remedy of the Worker's Compensation Act, California law recognizes an exception where the termination is alleged to violate a fundamental public policy. *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1100-1101 (1992); *see also Ely v. Wal-Mart, Inc.*, 875 F. Supp. 1422, 1429 (9th Cir. 1995)(holding that plaintiff's IIED claim based upon an alleged violation of the CFRA was not preempted by the California Workers Compensation Act). To the extent Plaintiff's IIED claim is based upon a violation of the CFRA, therefore, her claim is not preempted by the Workers' Compensation Act. Further, because discriminatory conduct is sufficient to show extreme and outrageous conduct, Defendant is not entitled to summary judgment on Plaintiff's IIED claim. *See Robinson v. Hewlett-Packard Corp.*, 183 Cal. App. 3d 1108, 1127 (1986).

E. After-Acquired Evidence Doctrine

Defendant asserts that under the after-acquired evidence doctrine, damages are barred on Plaintiff's claims, and Plaintiff's claims may even be barred altogether, because Defendant would have fired Plaintiff for lying about her pregnancy if it had known at the time that she was lying. Under the doctrine of after-acquired evidence, the "employer must establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it. The employer must show that such a firing would have taken place as a matter of settled company policy." *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 846 (1998) (citations omitted). Here, the only evidence Defendant has provided on this question is the declaration of Colleen Antonio, in which she states that "[h]ad I known that on March 2 and 3

Plaintiff was lying about her absences being related to her pregnancy, I would have initiated her termination for abusing the company's sick leave policies at that time." Antonio Decl. at ¶ 16. However, Defendant has failed to present any evidence showing the existence of a "settled company policy" under which employees are terminated for misrepresenting the specific nature of their illness. Indeed, although Plaintiff's supervisor explicitly recommended to Ms. Antonio that Plaintiff be terminated on this basis, Ms. Antonio failed to cite Plaintiff's representations concerning her pregnancy when she terminated Plaintiff. Therefore, Defendant is not entitled to summary judgment under the after-acquired evidence doctrine.

IV. CONCLUSION

Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

DATED: January 2, 2001

JOSEPH C. SPERO
United States Magistrate Judge